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Re: Response to Request for Information on Alabama Water Use Classifications

The Legal Environmental Assistance Foundation, Inc. submits these comments in response to the "Request for Information and Public Hearing to Evaluate Uses of Stream Segments in Alabama," published at 62 Fed. Reg. 4285 (1997). The import of these comments is that the present classifications assigned to many of the water segments identified in the "Request for Information" are *de facto* waste transport or waste assimilation classifications which are prohibited under 40 C.F.R. § 131.10(a). Accordingly, the present classifications may not be retained.

I. Permissible and Impermissible Water Use Classifications

40 C.F.R. § 131.10(a) provides:

Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of the water for public water supply, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. *In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.*

(Emphasis added). See also *Water Quality Standards Handbook: Second Edition* (EPA-823-B-94-005a, August 1994) at 2-1. The U.S. Environmental Protection Agency explains the foregoing prohibition as follows:

A basic policy of the standards program throughout its history has been that the designation of a water body for the purposes of waste transport or waste assimilation is unacceptable. At the public's suggestion, an explicit statement of this

policy has been added to § 131.10(a). The objective is to prevent water bodies from being used as open sewers.

48 Fed. Reg. 51410 (1983). The prohibition against waste transport and waste assimilation water use designations cannot be circumvented by the device of mere clever nomenclature.

II. Waters Do Not Have Use and Value for Agricultural and Industrial Water Supply/Industrial Operations

A. *Agricultural and Industrial Water Supply/Industrial Operations Classifications Are Intended To Be "Supply" Use Classifications*

The Agricultural and Industrial Water Supply (A&I) use classification adopted by the State of Alabama is described as "[a]gricultural irrigation, livestock watering, industrial cooling and process water supplies, and any other usage except fishing, bathing, recreational activities, including water-contact sports, or as a source of water supply for drinking or food-processing purposes." ADEM Admin. Code R. 335-6-10-.09(5). The Industrial Operations (IO) use classification adopted by the State of Alabama is described as "[i]ndustrial cooling and process water supplies, and any other usage, except fishing, bathing, recreational activities including water-contact sports or as a source of water supply for drinking or food-processing purposes." ADEM Admin. Code R. 335-6-10-.09(6).

B. *Historical and Present Supply Uses*

LEAF has not been able to identify the occurrence of any *bona fide* Agricultural and Industrial Water Supply or Industrial Operations uses of the waters identified in the "Request for Information" from 1973 to the present. Rather, these waters have been and are being used for municipal and industrial waste transport and waste assimilation. See III., B., below.

C. *Future Supply Uses*

The absence of present and historical *bona fide* Agricultural and Industrial Water Supply or Industrial Operations uses of these waters for 24 years suggests that such uses may not occur in the future as well. Absent an affirmative and convincing demonstration by the State of Alabama that future uses are likely to include Agricultural and Industrial Water Supply or Industrial Operations uses, the historical absence of such uses for the last 24 years is indicative that the designation is not appropriate, taking into consideration the uses and values of the waters.

III. Waters Are Designated to Accommodate Waste Transport and Waste Assimilation Uses

A. 1973 Use Designation

The waters identified in the following table were previously classified for "Treated Waste Transportation" and later reclassified for Agricultural and Industrial Water Supply or Industrial Operations. This reclassification did not represent any change in the use or value of the waters for

Water Segment	1973 Use Classification	Present Classification
Five Mile Creek (from Coalburg to Ketona)	Treated Waste Transportation	Agricultural and Industrial Water Supply
Hollinger Creek	Treated Waste Transportation	Agricultural and Industrial Water Supply
Opossum Creek	Treated Waste Transportation	Industrial Operations
Pepperell Branch	Treated Waste Transportation	Agricultural and Industrial Water Supply
Shirtee Creek	Treated Waste Transportation	Agricultural and Industrial Water Supply
Sugar Creek	Treated Waste Transportation	Agricultural and Industrial Water Supply
Valley Creek (from County road crossing 1½ miles NE of Johns to Opossum Creek)	Treated Waste Transportation	Industrial Operations
Village Creek (from Bayview Lake to its source)	Treated Waste Transportation	Agricultural and Industrial Water Supply

agricultural irrigation, livestock watering, or industrial cooling and process water supplies. Rather, the reclassification was effected to give the appearance of compliance with the prohibition against classifications of waste transport and waste assimilation in 40 C.F.R. § 131.10(a), and to maintain sufficiently low water quality standards to continue to accommodate waste transport and assimilation without imposing additional treatment requirements.

B. Relative Flows of Water and Waste

Another indicator that some of the waters identified in the "Request for Information" are classified for waste transport and waste assimilation is the extent to which the waters are dominated by waste discharges. The table below indicates the percentage of the water's flow which is waste (data could not be obtained on all stream segments in time to include in these comments).

Water Segment	Low (7Q10) Stream Flow	Design Waste Flow	Percent Waste Flow
Buck Creek (from Cahaba Valley to its source)	0.0 cfs (0.0 mgd)	4.64 cfs (3.0 mgd)	100%
Cane Creek/Oakman (from Lost Creek to its source)	0.0 cfs (0.0 mgd)	0.14 cfs (0.09 mgd)	100%
Cane Creek/Jasper (from Mulberry Fork to its source)			
Chickasaw Creek (from Mobile River to Mobile Street)			
Five Mile Creek (from Locust Fork to Ketona)			
Flint Creek (from Alabama Highway 36 to Shoal Creek)	0.9 cfs (0.58 mgd)	4.18 cfs (2.7 mgd)	82.3%
Hog Bayou (from Chickasaw Creek to its source)			
Hollinger Creek (from Road 5 miles east of Bay Minette to its source)	0.0 cfs (0.0 mgd)	3.09 cfs (2.0 mgd)	100%
Little Bear Creek (from Bear Creek to Highway 82)			
Lost Creek (from Alabama Highway 124 to its source)	0.012 cfs (0.008 mgd)	1.24 cfs (0.8 mgd)	99.0%
Opossum Creek (from Valley Creek to its source)			
Pepperell Branch (from Sougahatchee Creek to its source)	0.0 cfs (0.0 mgd)	2.97 cfs (1.92 mgd)	100%
Pigeon Creek (from Piney Woods Creek to its source)			

Rocky Creek (from Persimmon Creek to County road crossing north of Chapman)	0.0 cfs (0.0 mgd)	6.85 cfs (4.43 mgd)	100%
Shirtee Creek (from Tallassee hatchee Creek to its source)			
Sougahatchee Creek (from County Road 11 crossing to Pepperell Branch)			
Sugar Creek (from Elkahatchee Creek to its source)	0.0 cfs (0.0 mgd)	13.2 cfs (8.5 mgd)	100%
Three Mile Creek (from Mobile River to Mobile Street)			
Town Creek (from Cane Creek to its source)	1.6 cfs (1.03 mgd)	7.43 cfs (4.8 mgd)	82.3%
Unnamed Tributary to Pigeon Creek (from Pigeon Creek to its source)	0.0 cfs (0.0 mgd)	0.37 cfs (0.24 mgd)	100%
Valley Creek (from head of backwater above Bankhead Lock and Dam to County road crossing 1½ miles northeast of Johns)			
Valley Creek (from County road crossing 1½ miles northeast of Johns to Opossum Creek)			
Valley Creek (from Opossum Creek to its source)			
Village Creek (from Locust Fork to its source)			

C. But For Waste Discharges, Waters Would Not Be Classified As Agricultural and Industrial Water Supply or Industrial Operations

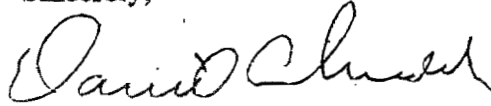
LEAF submits that but for the existence of waste discharges to these waters, the waters would have been classified for Fish and Wildlife uses (i.e., fishing, propagation of fish, aquatic life, and wildlife). Absent the industrial and municipal waste discharges located on these waters, most of these waters would achieve a level of quality sufficient to support Fish and Wildlife uses.

IV. Conclusion

LEAF submits that the weight of the evidence suggests that the State of Alabama is using the Agricultural and Industrial Water Supply and Industrial Operations classifications as a means

to accommodate waste transport and waste assimilation and to circumvent the prohibition against waste transport and waste assimilation designations in 40 C.F.R. § 131.10(a). Accordingly, the designation of these waters should be revised.

Sincerely,

A handwritten signature in dark ink, appearing to read "David D. Linder". The signature is fluid and cursive, with the first name "David" being more prominent and the last name "Linder" following in a similar style.

David D. Linder

Vice President & General Counsel